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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

GILLEN WASHINGTON, Plaintiff and Appellant, v. CALIFORNIA AUTOMOBILE INSURANCE COMPANY, Defendant and Respondent.	G055581 (Super. Ct. No. 30-2016-00831728) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, William D. Claster, Judge. Affirmed.

Law Offices of Dale Washington and Dale E. Washington for Plaintiff and Appellant.

O'Connor, Schmeltzer & O'Connor and Lee P. O'Connor for Defendant and Respondent.

* * *

This is an appeal from a judgment in favor of defendant California Automobile Insurance Company (CAIC) after a lawsuit by plaintiff Gillen Washington about the scope of insurance coverage. On appeal, Washington argues that CAIC failed to properly investigate, intentionally and in bad faith mishandled the claim, and that the trial court failed to apply the proper standard regarding breach of an insurance contract. CAIC contends the court correctly applied the law and the evidence supported the court's factual findings. We find the court applied the appropriate burden of proof, and that its factual findings were amply supported by substantial evidence. We affirm the judgment.

I

FACTS

We draw the facts primarily from the statement of decision. We note that Washington, as the party challenging the trial court's factual findings for a lack of substantial evidence, was "'required to set forth in [its] brief all the material evidence on the point and not merely [its] own evidence.'" (*County of Solano v. Vallejo Redevelopment Agency* (1999) 75 Cal.App.4th 1262, 1274.) Washington has failed to do so, and we may properly deem *all* substantial evidence issues waived as a result. (*Ibid.*) Rather than waiving all issues related to substantial evidence, we disregard any facts or set of facts as to which Washington has failed to present *all* relevant evidence in a fair manner.

CAIC is part of the Mercury Insurance Group. The automobile insurance policy at issue provided for collision coverage, stating: "The company, at its option, will repair, replace or pay for the owned automobile or part thereof, for loss caused by collision but only for the amount of each loss in excess of the deductible stated in the declarations."

In December 2014, Washington was in an accident in Arizona in a 2009 Nissan Murano, a sport utility vehicle, which was owned by his mother, Jill McKenna,

and insured by CAIC. He was headed downhill on an icy road, attempted to brake, and skidded into a ditch.

On January 6, 2015, a company called SCA Appraisal Company (SCA) inspected the car at Washington's residence in Flagstaff, Arizona at CAIC's request. SCA was hired to photograph the damages and provide an estimate. The inspector noted the car was not drivable and summarized damage to the body that was significant, with a repair estimate of $7,208.91.

The car was repaired at a "shop in Flagstaff known as Route 66 Auto Body." CAIC paid approximately $11,000 to repair the car, including all four wheels and various other parts.

The repairs did not include the transfer case, which Washington describes as "[a]n oil-filled gear box which attaches to the right front axle." An online automotive dictionary states that on four-wheel-drive vehicles, the transfer case "contains gears that connect a second drive shaft to send power to all four wheels instead of just the front or rear ones." (<https://www.cars.com/auto-repair/glossary/transfer-case> (as of Mar. 8, 2019).)

In late March, after the repairs were completed, Washington drove the car back to Orange County. He noticed a grinding noise during the drive, and contacted CAIC. Washington believed the noise was connected to the December 2014 accident. Washington brought the car to a repair facility in Huntington Beach called Gustafson Brothers (Gustafson). Gustafson determined that the transfer case and an adjacent axle assembly needed to be replaced. The car was inspected there by David Anderson, a damage appraiser for CAIC, and later by Paul Petty, a consultant.

After the investigation, which is further summarized below, CAIC declined coverage on the grounds that the damage to the transfer case predated the accident. Washington paid approximately $3,800 to repair the transfer case. This is the crux of this

case; if the damage was caused by the accident, it should have been covered by McKenna's collision policy. If not, the decision to deny coverage was proper.

After CAIC denied coverage, Washington sent several e-mails questioning the decision. CAIC reaffirmed its decision to deny the claim, noting the earlier transmission work and the history of case transfer leaks.

In July 2015, he filed the instant case. The first amended complaint alleged numerous causes of action, including breach of written contract. The case proceeded to a bench trial in due course.

With respect to the transfer case damage, the trial court summarized the evidence thus: "On the one hand, there is both evidence that the axle connected to the transfer case was bent, and that a bent axle can cause a leak in the transfer case. Thus, the April 16, 2015 note on the Gustafson invoice states: '[Gustafson employees] inspected the car with Paul [Petty] from Automotive Specialists (accident forensic investigator) and he will contact Dave Anderson at Mercury [CAIC] with his findings (bent axle, seal leak, transfer case) . . . .' [Citation.] Dave Anderson of CAIC stated in a telephone call on April 15, 2015 that 'Paul Petty . . . advised that the axle is bent, but it is bent in an odd way.' [Citation.] Both Monte Gaustad and Stan Rogers of Gustafson acknowledged that bent axles can result from a front end accident (though they were unable to opine on whether the accident in this case caused a bend), and Rogers added that a bent axle could cause the seal in the transfer case to go 'bad' thereby causing leaks and damage in the future.

"On the other hand, there also is evidence that the leak in the transfer case and the resulting damage was unrelated to the accident. For one thing, several witnesses testified that it was unlikely the axle would have been affected (i.e., bent) in the accident. According to Petty (who denied all of the statements attributed to him in the above paragraph), there was no bend in the axle when he visually inspected it at Gustafson. Moreover, upon inspection of oil residue on or near the transfer case, he concluded that

oil had been leaking from the transfer case for a long period of time-including before the accident. [Citation.] Petty testified that there was a 75-80% chance that the damage to the transfer case was the result of a longstanding oil leak and not the accident. Other witnesses ([Bob] Barney and Dave Anderson) concurred, stating that the likely result of a front end collision would be damage to the constant velocity joints or steering knuckle assembly rather than the axle.

"Also supporting the conclusion that the damage to the transfer case was not attributable to the accident are a series of documents evidencing a leaking problem for several years before the accident. Thus, on November 20, 2012 a note on a Surf City Nissan invoice indicated 'transfer case leaking.' [Citation.] On August 17, 2013 Surf City Nissan 'found transfer case leaking.' [Citation.] On May 31, 2014 a similar report was made by this dealer."

Based on the evidence presented at trial, the court concluded there was no clear evidence, but merely a "possibility," that the transfer case damage was caused by the accident, and Washington had not proved that it was "more likely true than not" that the damage was caused by the accident. Accordingly, the court found no breach of contract, and no bad faith on the part of CAIC.

II

DISCUSSION

Relevant Standards of Review

We review issues of law de novo, without deference to the trial court's findings. (*Roberts v. United Healthcare Services, Inc.* (2016) 2 Cal.App.5th 132, 149.)

We review the trial court's factual findings, however, for substantial evidence. A party "raising a claim of insufficiency of the evidence assumes a 'daunting burden.'" (*Whiteley v. Philip Morris Inc.* (2004) 117 Cal.App.4th 635, 678.) "When findings of fact are challenged in a civil appeal, we are bound by the familiar principle

that 'the power of the appellate court begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted,' to support the findings below. [Citation.] We view the evidence most favorably to the prevailing party, giving it the benefit of every reasonable inference and resolving all conflicts in its favor. [Citation.] Substantial evidence is evidence of ponderable legal significance, reasonable, credible and of solid value." (*Oregel v. American Isuzu Motors, Inc.* (2001) 90 Cal.App.4th 1094, 1100.)

We do not "reweigh the credibility of witnesses or resolve conflicts in the evidence." (*Rufo v. Simpson* (2001) 86 Cal.App.4th 573, 622.) This court is bound by implied findings made by the trial court, such as rejecting a witness's testimony. (*Stafford v. Mach* (1998) 64 Cal.App.4th 1174, 1182.)

Burden to Establish Coverage

Washington's primary legal argument is that the court applied the incorrect burden of proof in determining that the damage to the transfer case was not covered. The interpretation of an insurance policy is a question of law that we review de novo. (*Whittaker Corp. v. Allianz Underwriters, Inc.* (1992) 11 Cal.App.4th 1236, 1238.)

Washington, citing *Royal Globe Ins. Co. v. Whitaker* (1986) 181 Cal.App.3d 532 (*Royal Globe*), argues that the initial burden on the insured to establish coverage is "a 'light, initial burden that the type of accident could cause the physical damage at-issue . . . .'"[1] But this language never appears in *Royal Globe*, a declaratory relief action that found the trial court had properly *denied* coverage in a duty to defend case that had nothing whatsoever to do with physical damage. (*Id.* at p. 534.) Indeed, *Royal Globe* correctly states that "the burden is on the insured initially to prove that an event is a claim within the scope of the basic coverage" (*id.* at p. 537), as does a more

[1] A Westlaw search for this alleged quotation turns up only one match: Washington's brief in this case.

recent case upon which Washington relies, *Vardanyan v. AMCO Ins. Co.* (2015) 243 Cal.App.4th 779: "'When an issue of coverage exists, the burden is on the insured to prove facts establishing that the claimed loss falls within the coverage provided by the policy's insuring clause.'" Neither case states this burden is "light," and Washington offers nothing to demonstrate the proper burden is not the normal civil burden of proof, a preponderance of the evidence.

Indeed, one case the trial court relied upon summarizes the relevant issues: "An insurance policy is written in two parts: the insuring agreement defines the type of risks which are covered, while the exclusions remove coverage for certain risks which are initially within the insuring clause. [Citation.] Therefore, '. . . before even considering exclusions, a court must examine the coverage provisions to determine whether a claim falls within the potential ambit of the insurance.' [Citation.] This is significant for two reasons. First, '. . . when an occurrence is clearly not included within the coverage afforded by the insuring clause, it need not also be specifically excluded.' [Citation.] [¶] Second, although exclusions are construed narrowly and must be proven by the insurer, *the burden is on the insured to bring the claim within the basic scope of coverage, and (unlike exclusions) courts will not indulge in a forced construction of the policy's insuring clause to bring a claim within the policy's coverage.* [Citations.] Thus, the plaintiff has the burden of establishing that there has been an 'accident' or 'occurrence.'" (*Collin v. American Empire Ins. Co.* (1994) 21 Cal.App.4th 787, 802-803, italics added.)

Washington also confuses the insurer's burden to establish an exclusion, which is a more difficult task, with his own burden of establishing coverage at the outset. He does correctly cite cases that state, as does the case quoted above, that demonstrating if an exclusion applies is the insurer's burden, and that exclusions should be construed narrowly. But no exclusion is relevant here – establishing initial coverage was the basis of the court's decision.

The trial court applied the correct burden of proof – that Washington had to demonstrate the damage was caused by a covered event, e.g., the accident. The court concluded that although it was "a close call," Washington had established only "a possibility" that the damage to the transfer case was caused by the initial accident. We find no legal error here, and conclude the court applied the correct burden of proof.

Substantial Evidence

Washington next offers several arguments regarding substantial evidence, specifically that the trial court erroneously concluded that CAIC had not reasonably investigated the claim, including inspecting the vehicle. The court explicitly found "no evidence" that CAIC had failed to investigate or that the investigation was tainted by fraud or bad faith.

Before reaching these issues, to be crystal clear, we find there was substantial evidence to support the trial court's conclusion as to coverage. Not only did the court use the correct standard, it had more than enough evidence to find that the damage to the transfer case predated the accident. In addition to the testimony of numerous witnesses, the court also had the information about numerous prior invoices from Surf City Nissan that found a preexisting leaking transfer case.

As to Washington's claim of a fraudulent, unreasonable investigation, these all begin with a premise that he failed to prove: that the steps he claims were not taken were necessary to determining coverage. He did not call any witnesses to testify that CAIC's actions were unreasonable, improper, or did not meet industry standards; the only witness who testified about this was called by the defense, who testified the initial investigation was "reasonably thorough," and once taken to the body shop, the car "was given a proper inspection." In general, he testified that CAIC's actions were "reasonable and in accordance with my experience in the industry." He opined the investigative

process was "fair and reasonable." Substantial evidence supports the trial court's conclusions that Washington failed to establish fraud or bad faith.

III

DISPOSITION

The judgment is affirmed. CAIC is entitled to its costs on appeal.

MOORE, J.

WE CONCUR:

O'LEARY, P. J.

FYBEL, J.